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COSMOPOLITAN CUSTOM AND INTERNATIONAL LAW

So on a time walking with me along the Thames' side at Chelsea, in talking of other things he said unto me, "Now, would to our Lord, son Roper, upon condition that three things were well established in Christendom, I were put in a sack and here presently cast into the Thames." "What great things be those, Sir," quoth I, "that should move you so to wish?" . . . "In faith, son, they be these," said he, "the first is that, whereas the most part of Christian princes be at mortal war, they were all at universal peace." ROPER, *Life of Sir Thomas More*.

FROM the Middle Ages onwards there have been schemes without number for securing perpetual peace to the civilized world, from Dante's magnificent vision of universal monarchy to the pleasing but unsubstantial imaginations of pacific anarchists, and from elaborate plans of confederation with complete executive, judicial and legislative powers to proposals which reject military compulsion altogether and allow, at most, some exercise of economic pressure against a contumacious member. We have also seen established in our own time a considerable machinery for the reference of national disputes to good offices or arbitration, and it has worked well on several occasions. The too familiar evils of war have been denounced with unwearied vigor, and new and ingenious arguments brought forward to prove that under modern conditions war can end in no real profit even to the successful party. Notwithstanding all this, we see the greater part of Europe involved in a war which broke out with unexampled suddenness and violence. All European Powers of the first rank are now bel-

ligerents; and the one neutral Great Power, the United States, has been hard put to it to steer an even course between the perils of intervention and the scandal of failing to protect its own citizens' lives and goods. Thus the war is of an extent to which no parallel can be found except in the final coalition against Napoleon.

Less than a fortnight elapsed between the opening and the closing events of the preliminary stage, the Austrian note to Serbia and the British declaration of war. In those fatal days all the known methods of averting an irreparable breach of the peace were tried, and all failed. An offer of a reference to The Hague tribunal was twice made, by the Serbian Government and by the Emperor of Russia, and twice ignored. The British suggestion of a conference found no favor at Berlin. Informal mediation and good offices never had a chance, and the supreme expedient of urgent personal messages between some of the Sovereigns concerned fared no better.

We are driven to the conclusion, which indeed is not novel, that the means hitherto in use for preserving peace are effective only when the parties have already made up their minds not to fight, or desire to be fortified with good reasons for not fighting. Let us clear the ground by stating shortly what they are, and observing their strong and weak points.

Arbitration, formally conducted in the manner of judicial procedure by argument and reasoned decision, is good for the settlement of such disputes as are reducible to definite issues. Questions of boundaries and other territorial rights, whether depending on the interpretation of treaties or on claims of continuous occupation, are eminently fitted for this treatment; and, since the constitution of The Hague tribunal, it may be said that a court is provided and always open to those who will use it. But, as matters stand, resort to this tribunal, or to any other which may be arranged between the parties by treaty or otherwise, can be had only by consent. There is no way of compelling an independent state to go to arbitration, or to admit that arbitration is the right procedure in any particular case. Moreover, there are many differences which are not suitable for judicial arbitration by reason of the difficulty in framing issuable questions for the tribunal, or of the facts pointing not to the need for a clear decision, but on the contrary to a compromise without any positive decision being the

more acceptable solution. More harm than good has been done, I venture to think, by enthusiastic advocates for arbitration who have not only pressed its merits beyond what they will bear, but in their eagerness to prescribe it as a panacea have wilfully belittled the older arts of diplomacy.

Mediation, that is, the intervention of one or more third Powers for the purpose of conciliation and persuasion, but without reference of any defined question or authority to decide anything, is a more elastic method than arbitration, but in operation it is one degree weaker. For it supposes, in addition to a previous willingness to agree, that the same will continue throughout. Either party can break off at any time without being exposed to a charge of bad faith, which in the case of arbitration is not so. On the whole, mediation, and the less formal equivalent known as "good offices," are more useful for smoothing the way towards a settlement than for conducting the matter to an end. So it was when the good offices of the French Government were employed with complete success in the matter of the Dogger Bank incident of 1904. The "democratic control" extolled by some people would, in my judgment, almost certainly have led to war between Great Britain and Russia if it had been applied on that occasion.

Conferences of ambassadors or special delegates have often been useful in effecting a settlement after war, and in confining local wars within their original limits. But they are seldom called together until great mischief has already been done, and no case is known where a formal conference has wholly averted impending war. The most favorable example in our time is that of the Congress of Berlin held in 1878, which did indeed keep the peace in Western Europe, but achieved at best a precarious compromise in the real seat of danger, the Balkan peninsula. Not that compromise is in itself a bad thing, but when, being in its nature unanimous or nothing, it has to be made between several parties having divergent interests and ambitions, the merits of which bear no necessary proportion to the force they can exert, the result is less likely to be a genuine voice of collective reason than to be such as will give the least dissatisfaction to the most powerful. And that kind of compromise lasts just as long as the more ambitious and the less contented parties continue to think the possible advantage of breaking it not worth the risk. Direct negotiation, when it can be applied,

is obviously the best way of all in national as well as in private affairs. But, even more than other methods, it assumes the existence and continuance of a genuine will to agree. Moreover, it can easily be misused by any Power which is really bent on war, failing complete satisfaction of its demands, but wants to gain time for military reasons.

Such being the manifest defects of the remedies available without actual force of arms, it was no wonder that the title of the law of nations to be law in any proper sense was often disputed. Nevertheless it appeared to many thinking men, before the outbreak of this war, that, if the formation of an international procedure was very slow, some hope of security was given by the increase of other deterrent motives. The very magnitude of modern armaments and warlike preparations, the cost of hostile operations on an answerable scale, and the complication of modern economic interests, all increased the risk that must be incurred by any government breaking the peace, and seemed to make deliberate aggression less and less probable as time went on. All such expectations, held indeed for the most part with knowledge that they were precarious, are now bitterly disappointed.

The commonwealth of nations has relapsed into a state like that of medieval kingdoms at the time when private war was still a common mode of redressing real or supposed injuries, limited in practice only by the attacking party's estimate of his chances.

Municipal law had completed its emergence from that state in western Europe about the time when Grotius began to show how the law and usage of nations could be reduced to rules which, although not formally sanctioned, might be expected to be received in common opinion and tolerably well observed in practice. We shall not inquire in this place how far that expectation also has been disappointed in the present war. But it may be useful to observe by what steps respect for ordinary law was brought about within the limits of municipal jurisdictions, and to see whether in the relations of independent states we can trace analogous tendencies. As regards England at any rate, it may be worth while to remember that down to the beginning of the eighteenth century, if not later, the actual coercive power at the disposal of the Government was far less in proportion to possible means of resistance than it is now, so far that one is easily tempted to call it insignificant. Neverthe-

less, as national governments took the place of merely personal lordships and overlordships, they were not only obeyed but on the whole better obeyed than their predecessors. Rebellions and revolutions have taken place, and in various countries at various times there has been an abeyance of regular government, or a series of abrupt transitions from one claimant of authority to another. But it may be observed that in the restoration of settled authority after any such period the new government has generally proved more efficient than the old. Even if it claimed less power, it was in fact able to exercise more. This was notably the case in the sequel of the French Revolution.

Two principles appear standing out in the Common Law as it begins to come to its strength in the twelfth and thirteenth centuries: the stern condemnation of self-help, and the duty of every man to give aid in keeping the peace. Applied to the law of nations, those principles would go far to prevent war. It will be time to talk of absolute prevention when we can point to any municipal code or judicial system that has succeeded in abolishing homicidal crime and making riot impossible. We avoid a rather favorite word of some publicists, "unthinkable," for it may be noted that when a man cries aloud that something unpleasant is unthinkable, his real meaning is apt to be that he is very much afraid of it. Let us see how far, as between nations, we have hitherto failed to satisfy the requirements of even medieval law.

It is now the common learning of historical students that the King's Court, in the days of Bracton and later, set its face most firmly against every taking of the law into a man's own hands. Even the necessity of corporal self-defence was in strictness an excuse for the breach of the peace rather than a justification. In matters of property the recaptor made himself a wrong-doer though he might be in a position, if he came as a suitor, to show a perfectly good claim. His act was unlawful because it lacked the proper sanction of the King's justice, and the words *sine iudicio* were so constantly associated with the word *iniuste* as to become all but indistinguishable in meaning. Possession once established had to be recognized as part of an existing order of things with which no merely private judgment could be allowed to meddle. The later medieval law, while it allowed a wrongfully lost possession to be resumed in a peaceable manner if opportunity could be found,

enacted statutory penalties to strengthen the prohibition of forcible entry. We are not concerned here to measure the varying degrees of approximate observance conceded to the rule as the King's hands were stronger or weaker, the country more or less settled. The recrudescence of private war at the very end of the Middle Ages, under such partisan pretexts as the Wars of the Roses afforded, or without any pretext at all, is notorious. But nobody would have dared to deny the existence of the rule as a rule of law. So long as the law makes her continual claim in the face of passing outbreaks of anarchy, she stands a good chance of coming into her own again; and the reign of law has been practically complete for two centuries or more in the whole of western Europe. It is well to remember that, although it may not be a fact of the most compelling kind, the existence of an admitted positive rule is as much a fact as anything else, and cannot safely be neglected; as is shown by the anxiety of aggressors, however powerful, to make out that some kind of rule is on their side.

If, therefore, we could find any similar rule in the custom of nations, anything like a collective reprobation of self-redress by arms without proved failure of peaceable means, we might be content to believe that there is, or was before the present catastrophe, a movement on right and promising lines towards the hardening of a vague moral sense into more or less effective legality. But so far all who have set their faces in this direction have been confronted with an extremely stubborn obstacle. This obstacle is the doctrine of indefeasible state rights, now grown to a dogma from which some publicists and even diplomats have not hesitated to develop absurd consequences. I do not here allude to that form of modern German philosophy which makes the state a kind of Absolute, and not only denies the individual citizen any rights against it, but leaves no measure of right applicable as between sovereign states, and does not so much as admit the natural bond of good faith. What I mean is the political doctrine which asserts that any delegation of real authority outside the state's own jurisdiction is a derogation from its independence. That doctrine has been asserted with disastrous effect at The Hague Conferences, not only by Germany but by the delegates of some South American states who thought it, seemingly, a good way of advertising their claim to stand on an equal footing with any European Power. This con-

fusion of equality before public law with having an equal voice for all purposes appears to me no more reasonable than if the smaller shareholders in a company should demand not only an equal right to be heard but equal voting power for every shareholder even if he had only one share. Manifestly no business corporation could work on such terms; and until princes and rulers take up the preservation of peace among nations as a matter of real business and not of pious wishes expressed by non-committal resolutions, they will not get the business done. The most ingeniously framed international tribunal will not serve so long as the submission of disputes to its award is merely voluntary; and as regards the commonwealth of nations arbitration treaties whose obligation is confined to the particular contracting parties are merely private arrangements. It seemed possible some years ago that a network of treaties framed on a substantially uniform plan might embrace all the civilized nations and create a custom of referring disputes to arbitration or conference which would become a recognized part of public law. But now the obligation of treaties itself is in jeopardy, and is openly treated by the military school of publicists as being no stronger than that kind of promise which, as a Roman jurist said, "*ex voluntate promittentis statum capit.*" So far are we, at present, from any general or settled opinion that states no more than citizens within a state should take on themselves to be sole judges in their own cause. All forms and methods of pacific adjustment are still subject to dangerous exceptions. We have made treaties and renewed them, to be catalogued with innocent exultation by the secretaries of peace and arbitration societies; it costs nothing to yearn for perpetual peace with Siam or Ecuador. We have established a court, accepted the gift of a palace to house it in, and appointed learned and discreet persons of divers nations as a judicial rota, who have even decided cases of considerable importance; but all this under the reservation — unless we really want to fight. After the present war we must break down that reservation, or relapse into the state of armed mutual suspicion, or buy peace by submitting to the virtual dictation of a triumphant military Power which openly declares its will to be above law.

Now one of these alternatives is repugnant to the nature of free and civilized men and shown by the history of the last two centuries to be chimerical; at least most people west of the Rhine, east of

the Vistula, and south of the Alps think so. The collective efforts of Europe towards rational policy have been halting enough, but as to one thing there has been general agreement, namely, that an overbearing supremacy of any one Power is not to be tolerated, and that war undertaken to frustrate that kind of dynastic or national ambition is just.

According to Professor Ostwald of Leipzig, Germany wants to organize Europe.¹ As that learned person is a chemist and not a historian, he may not be aware that Europe has already thrice refused to be organized at the bidding of any one dictator.

When Philip II of Spain sought a crown of universal dominion as the temporal reward of his zeal for the counter-Reformation, he failed even without being opposed by a formal coalition. A century later Louis XIV claimed to be the arbiter of Europe, and Europe turned upon him in such sort that the best informed Frenchmen accepted the Treaty of Utrecht as a providential deliverance from utter ruin impending on his kingdom. Another century passed, and a greater captain than any who had faced Eugene and Marlborough commanded, for a time, triumphs beyond any of Louis XIV's aspirations. After ten years of predominance he was cast down with a yet heavier fall. All these mighty men fell: "*graviter magni magno cecidere ibi casu.*" Shall any stand where they could not stand? Can the Hohenzollerns overcome Europe's fourth refusal? The answer to that question, a century after Napoleon's final defeat, will be plain before long. Our point here, however, is only to call to mind that underlying all these dramatic failures is a constant principle, not so much a rule as a collective instinct of national self-preservation; working, hitherto, clumsily and with many drawbacks, but still discernible in the background

¹ So too August Julius Langbehn as reported in the *Times* Literary Supplement, Sept. 9, 1915: Germany "by its very position must either dominate the political life of Europe or be dominated."

We have our Chauvinists in Great Britain, but I have not heard of any of them going so far as this, nor of any country other than Germany where the swagger of a common bully is uttered and received in sober earnest by learned and official persons. The heterogeneous composition of the British Empire is perhaps of itself a sufficient security against the dream (if any one should ever dream it) of organizing the world on any British pattern. Our Dominions have made their own constitutions, and made them each in its own way. Whenever India makes hers, which will hardly be in my time, it must be in an Indian and not a merely second-hand European way if it is not to be a failure.

of all schemes and combinations, and always perilous to those who neglect it. This principle is compendiously named the Balance of Power. Vituperation and ridicule have been showered on it by superficial politicians, foolishly taking it for a cause of the evil for which it was an imperfect remedy. Call it what you will, maxim, rule of policy, or mere tendency, it is rooted in the human nature of men who will not renounce the liberty of living in the fashion of their own countries. If statesmen are to be censured herein, it is not for recognizing that fundamental right, but for failing to give it better effect and to be impartial in their recognition. The conception of the Balance of Power is sound enough; the problem is to lift it out of the region of undefined and unordered usage and to clothe it with assured sanction in the future commonwealth of nations. It must also be protected from being made to serve as a stalking-horse for restless ambition and dynastic jealousy: such abuse is not unknown in modern history. Being really in the nature of homage from vice to virtue, this does not justify, though it partly explains, the denunciation of the principle itself by well-meaning advocates of lax and shallow liberalism, who must now be surprised to find themselves on the side of the anarchist military school. So did the English ultra-royalists after the Restoration find themselves, as to the fundamentals of secular polity, in the same boat with Hobbes, whose ecclesiastical doctrine they abhorred.

Besides the various accidents to which the want of defined authority must expose the Balance of Power doctrine, it suffers from a graver inherent defect. It becomes operative only when the mischief has already reached an acute stage and the time for milder remedies is past. Rulers who aim at domineering over their neighbors do not begin by talking about it even in their own official counsels. One quarrel at a time, and with the weaker adversaries first, is the modern way.² More or less plausible reasons are seldom wanting; and, though the weaker state thus attacked will appeal for help in any quarter that seems at all promising, few cases are so simple that the grounds of such an appeal will evidently carry conviction if judged on the particular merits. There is no admitted duty to come to the aid of the weaker, nothing equivalent to the legal force of the medieval hue and cry. Nevertheless traces of a

² Not that it is always politic. Certainly Polyphemus made the worst mistake of his life when he left Odysseus to be eaten last. But why be a cannibal at all?

wholesome usage, which seemed about to become a true custom of nations, were noted by an acute student of affairs half a century ago. W. A. Kinglake, the historian of the Crimean War, went so far as to speak of a "Supreme law or usage which forms the safeguard of Europe" in a chapter which, so far as I know, has been wholly neglected by professed writers on the law of nations.³ He suggests that "perhaps under a system ideally framed for the safety of nations and for the peace of the world a wrong done to one state would be instantly treated as a wrong done to all," but regrets that "in the actual state of the world there is no such bond between nations." Nevertheless there is not complete impunity for aggressors. Under certain conditions interference is possible and may even be called usual. When wrong is done to any state, when it is attended with consequences injurious to any of the Great Powers, and when that Power is in a position to exert its force with a fair prospect of success, then Europe is "accustomed to expect" that the Great Power so affected will either take arms or labor for an effective combination of neutral states. Kinglake proceeds to point the moral from the history of the Napoleonic wars, instancing the disastrous failure of Prussia to fulfil this expectation in 1805. His immediate object was to lead up to the contention that the Crimean War might and ought to have been prevented by a more firm and patient European diplomacy, had the Powers interested only taken a course of combined action betimes and adhered to it: a contention now of diminished interest, though I believe Kinglake's opinion is pretty generally accepted. It is too manifest that, so far as the recognition or efficacy of any such usage is concerned, whatever change has taken place since he wrote has been for the worse.

In the generation preceding the War of 1914 we lived under a roughly approximate and, as it has proved, unstable equilibrium formed by groups of Powers — a constitution, if one may so call it, with two opposing parties and no government. The smaller states were for the most part either nominally protected by express treaties or attached to one or the other group by some such ties (not necessarily or exclusively of a material kind) as made it that group's interest to protect them at need; and it was commonly supposed

³ *INVASION OF THE CRIMEA*, vol. 1, ch. 2.

that they might thus count on a tolerable degree of security. But the Swiss made up their mind long ago to take no risk by putting their trust in either princes or treaties, and the event has shown that they were well advised. There was nothing in the nature of this rough equilibrium, nor in any of the international conventions made for various purposes, useful as these were in their sphere, to prevent indefinite increase of armaments under the stress of mutual fear and jealousy. Those passions were fruitful, and waxed stronger from year to year on the noxious growth of their own fruit. Certain well-meaning publicists darkened counsel and committed themselves to denying manifest facts by maintaining that such fears had no foundation at all. Events have sufficiently rebuked them, but it is not material to attempt any nice measure of their delusion. The mischief, at any rate, was there and obvious. A remedy was hardly less obvious, but obvious remedies are not always easy to put in practice. Overgrown armaments, it was said, might be checked by a general convention, if not for an actual proportional reduction, yet for arresting the process of growth; or if this was too cumbrous and complicated, much could still be done if one or two leading Powers in each group could come to an understanding and begin to set an example. It was no mere affair of discussion among publicists or in semi-official utterances. Limitation of armaments was the object aimed at, in the first instance, by the Emperor of Russia in convening the first Peace Conference held at The Hague in 1899. And yet nothing came of a proposal on the face of it so reasonable. All men, or almost all, spoke well of it in principle, but none were found to venture on a first step in execution. Great Britain alone among the European Powers was prepared to give any substantial support. Germany flatly refused to consider the subject at all at the Second Peace Conference of 1907. It must be admitted that effectual discussion would have called for disclosure of matters which could not well be put on the table of a cosmopolitan conference; but it is not so clear that, given a general will to reach a practical conclusion, the technical problems could not have been entrusted to a select and secret committee which would have reported results without entering on the details of its reasons. Official or demi-official proposals, of a less ambitious kind and confined to naval armament, were publicly made at later dates by the British to the German Government; but Germany, for whatever

reason, did not see the way to fall in with them to any considerable extent. The negotiations of 1912, now laid open to the world, did not in terms make any provision about armaments; they rather aimed at avoiding the technical difficulties by making war between the contracting Powers so unlikely that armaments might be safely reduced, or not further developed. It would take us too far to dwell on them here. But it may be observed that a treaty of conditional neutrality with no means of interpreting the conditions in case the parties differ, or a promise of "benevolent neutrality" in certain events, a term unknown or at least undefined in the law of nations, is not exactly the most hopeful instrument of peace one could desire.

For the sake of completeness it is well to mention one more conceivable check to military ambition which has been invoked by lovers of peace any time the last thousand years: the authority of the Church, or rather, since the Reformation, the influence of the many churches and congregations of modern Christendom. It is notorious that religious motives have never been effectual on a large scale to restrain war even between states professing exactly the same religion, to say nothing of the specially ferocious wars of which theological and ecclesiastical controversies were the cause or pretext. Between the Reformation and the French Revolution the Most Catholic King of Spain, the Most Christian King of France, the Holy Roman Empire, and the Holy See itself in respect of its temporal possessions, were repeatedly at strife among themselves, one or more of them being as often as not in alliance with Protestant rulers against fellow Catholics. The ultimate historical reason lies far back and is plain enough. Christianity in its primitive form was the rule of a religious order which left secular government, war, peace, and politics altogether outside, and obeyed the temporal power without question in everything short of acknowledging its false gods. There is no knowing what a free and independent Christian Church might have done. But the conversion of Constantine, as it came about, entangled the Church in the existing system of the Roman Empire, committed it, after a brief glimpse of universal toleration, to persecution of dissidents, and made it impossible for officialized Christianity to take up any firm position against militarism. The voice of the Society of Friends may be not far from the mind of the really primitive Church, but it is a voice crying in

the wilderness. At the beginning of the official elementary manual of Christianized Roman law, the Institutes of the orthodox Emperor Justinian, war and slavery are alike recognized as lamentable but unavoidable evils which must be tolerated in the actual condition of human society. If all men were virtuous and reasonable there would be no crime and no war. Justinian knew that as well as any modern pacifist.

The sum of the matter is that good intentions have been manifested in various ways, and with partial good effects, but that in the field of the larger European ambitions and rivalries they have been baffled for want of appropriate or adequate organs. Thomas Hobbes said: "Covenants without the sword are but words, and of no strength to secure a man at all." But we have not as yet even covenants that are sufficient on the face of them to cover such a case as that of the War of 1914. Every commonwealth has its own internal peace, and breach of that peace is a substantive offence. Private force is indeed excused or justified on certain occasions, but the law and not the party must judge whether there was real and sufficient occasion. The commonwealth of nations must have its own peace too, a peace established with justice and judgment and with means of enforcing the far-reaching rule "*iniuste quia sine iudicio*." Otherwise we must despair of having any real commonwealth of nations at all. We have now had our lesson that nothing short of this will serve. Another word of Hobbes is to the purpose: "a common power to keep them in awe." Such a power has to be devised, as being no less proper and necessary for nations than for natural persons. Not that states are, in one sense, any less natural than individuals; for they are certainly in a state of nature with regard to one another at present, whether individuals ever were so or not. There is no novelty whatever about the ends to be sought, and the principal aim of the foregoing survey has been to enforce this elementary truth. Nor is there any doubt as to their importance, except in the philosophy of the militarist school who would throw back the society of nations not only to a pre-Grotian but to a prehistoric stage. But we must proceed warily. A real federation of the sovereign states which have been parties to the Postal Union, the Conventions of The Hague, and so forth, is at best a counsel of perfection too remote to be considered with any profit. Even if we could suppose the Powers consenting to establish a federal ex-

ecutive machine independent of any component state, the difficulties, first of making it strong enough to be effective, and then of securing a really impartial command, would be enormous. Europe might become a polyglot federal commonwealth like Switzerland if we were threatened with an invasion from Mars. We must look in the direction of a quasi-federal alliance, a league of peace and international jurisdiction guaranteed by the joint and several force of all the allies. It is not necessary, though desirable, that such a league should include all the considerable civilized Powers. The league, as regards all states outside it, would have to be a defensive alliance; and this would be a drawback so far as the allies were compelled to remain in the position of the strong man armed. But the refusal of one or two Powers ⁴ to come in, even if they were great ones, would by no means be fatal to the scheme. In any case the league would warrant its members against attacks from without; the amount of standing expense and preparation to be undertaken for that purpose is a matter of degree. The members would on the other hand be strictly forbidden to commit hostile acts against one another, and bound to be assisting to the common authority both against external aggression and against any recalcitrant member.

Need I repeat that in the broad lines of such a plan there is nothing unknown or unfamiliar to publicists? Readers of the *HARVARD LAW REVIEW*, at any rate, are not likely to want any such reminder. Many projects intended to carry out these ideas are in existence. A large proportion of them, unhappily, are on the face of them unsatisfactory. They commit themselves to overmuch detail and lose themselves in anticipating imaginary friction while they neglect substantial difficulties; or they treat sovereign states as if they were litigants before an assize court, and expect them to take over a servile imitation of municipal justice with all its formalities and other imperfections; or they are framed by speculative writers who have no experience in the conduct even of ordinary business. This last fault, perhaps, is the commonest; but the real knot of the problem is in the framing of a judicial system which shall not be merely

⁴ Or possibly one leading discontented Power, and satellites formed out of the more kindred fractions of an ally not only defeated but broken up into several states, together with such minor states as had shared its misfortunes. It is idle, however, to speculate on contingencies which would make no great difference to the general situation.

forensic. Unrelieved forensic method has already broken down in many kinds of municipal affairs. It will not work for the settlement of trade disputes, or for many branches of local government. Common law pleading sought to drive the parties to an issue. The strict form of it which prevailed down to the middle of the nineteenth century and now survives in only a few jurisdictions pursued this false logical ideal to the detriment of substantial justice. That is what we specially want to avoid for a group of juridically equal states who are anxious to submit their differences to equitable settlement. Peace and contentment are more important than logic. The more one considers this point, the more vital it appears. Only one published plan has come to my notice which handles it quite frankly and, in my humble opinion, effectually. This is not to deny the merit or, within bounds, the utility of many other contributions to so large and difficult a theme; but critical discussion or analysis of even a selected number would not be appropriate here. I may as well dismiss at this point a suggestion made in some quarters that seems to me wholly misconceived. Any one who imagines that the settlement of terms of peace between the belligerents in the present war can be mixed up with revision of The Hague Conventions, or of any other general rules in the law of nations, not to speak of reforms or innovations of wider scope, is living in a world of dreams, and the dreams of a sleeper who has never known anything of public business in his waking hours. Reconstruction of public law must come, but as a distinct undertaking and as of common interest to the world.

The plan I venture to single out as eminently practical is that put forward by Mr. Taft in an address delivered at Cleveland, Ohio, in May, 1915, and published by the American Society for Judicial Settlement of International Disputes. It is founded on a careful consideration of the interstate jurisdiction and functions of the Supreme Court of the United States. It brings out more clearly than any other statement I have seen, though it is not the only one which takes the point,⁵ the need of providing for such questions as in that court have been held not "justiciable": questions which

⁵ The distinction between "justiciable" and "non-justiciable" disputes has been in the air of English discussion for several months, and one scheme generally like Mr. Taft's, and apparently conceived about the same time, is in print, but as it is not published I must say no more of it.

nevertheless, when they arise between independent nations, may well be as troublesome and dangerous as any others, though not capable of a strictly judicial solution. Mr. Taft's League of Peace would have a judicial court for justiciable matters, with authority to decide whether any question referred to it is justiciable or not. Such authority is in fact exercised by the Supreme Court at Washington, only in the case of a negative answer the means of federal justice are exhausted. For non-justiciable cases Mr. Taft would have a Commission of Conciliation with power to mediate and recommend. It would seem desirable that the two bodies should have at least some of their members in common, a point of detail on which Mr. Taft says nothing. There appears to be no reason why the parties should not go before the Commission of Conciliation in the first instance if they are so minded, or before a mixed Committee of Selection which might sift out the justiciable and non-justiciable questions in any case of unusual complexity.

International law should be developed by means of conferences whose formulated results would be laid before the Governments of the League for a certain time, and accepted as binding if no objection were made. This method of legislation in technical matters has been quite familiar for some time to English lawyers and public men. We live under a host of Orders in Council and departmental orders which have acquired statutory force by being laid before Parliament for a specified time and not opposed, and the system works quite smoothly. To an English legal mind, therefore, Mr. Taft's way out of the various pitfalls of The Hague Conference appears as practical as it is elegant.

There would be no need for a direct process of execution to enforce the judgments of the Court or the recommendations of the Commission. Any attempt either to resist a decision or to gather its fruits by violence would be an offence against the League, to be met by prompt repression. Mr. Taft has not explicitly considered the case of a defeated party trying to evade the consequences by vexatious delay. That case does not seem very likely, but I submit that it could be dealt with by commercial restraint or other forms of pressure which would be quite as effective as military coercion and free from its dangers.

We cannot ignore the contingency of some Power of the first rank refusing to join a League of this kind. Any such Power

would, as I have hinted, be simply left outside, and confronted with such military precautions as the League judged necessary. This would be consistent with diplomatically correct relations, though not with cordial friendship. I do not believe that an attitude of dissent would be permanent, for the simple reason that there would be nothing to gain by it. If any Power could afford to stand out better than another it would be the United States, but I do not think any American Government would be likely to take that course, or American public opinion to sanction it. On the contrary, the United States is the one Great Power whose initiative in convening the preliminary Conference⁶ would be most natural, most free from suspicion, and most welcome.

For the first time in history the civilized world stands in face of an undisguised claim, backed by enormous military power let loose after many years of preparation, to conduct war on the principle of subordinating all natural and conventional rights to military necessity, which means the convenience of army commanders judged by themselves without appeal. Such a claim asserting itself in arms can be repelled, in the first instance, only by superior force of arms, for the claimant owns no other argument. When that is done, the broken and flouted law of nations must be strictly revised by a general agreement of civilized Powers, and better sanctions provided for it; and the aim of those sanctions must be not only to regulate warfare but to prevent wars of surprise in future. Let us hope that to that end such fitting measures may be ordained by the wisdom of the nations as will carry with them a just, effective and universal authority.

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⁶ The existing mechanism of the Hague Peace Conferences might perhaps be utilized for this purpose to some extent, but I doubt it. At all events the procedure would have to be radically different. I am inclined to think that the preparation of agenda for anything like a cosmopolitan Congress should be in the hands of a much smaller body.